

Commissioners of the State Ins. Fund v Kalafatis

2011 NY Slip Op 31917(U)

July 12, 2011

Supreme Court, New York County

Docket Number: 403140/2010

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 403140/2010

COMMISSIONERS STATE INSURANCE

INDEX NO. _____

vs
KALAFATIS, KOSTAS

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

DEFAULT JUDGMENT

for _____

No(s). _____

Answering Affidavits — Exhibits _____

No(s). _____

Replying Affidavits _____

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 13 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 12 2011



HON. JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

FILED

Supreme Court of the State of New York
Country of New York: Part 10

JUL 13 2011

-----X
THE COMMISSIONERS OF THE STATE
INSURANCE FUND,

NEW YORK
COUNTY CLERK'S OFFICE
Decision/Order
Index No.: 403140
Seq. No.: 001

Plaintiff (s)

-against-

PRESENT:
Hon. Judith J. Gische
J. S. C.

KOSTAS KALAFATIS.

Defendant(s),

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf n/m [3215] w/JIG affirm, exhs, AOS	1

-----X

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action in which plaintiff, the Commissioners of the State Insurance Fund ("SIF") seeks to enforce an unpaid judgment against Kostas Kalafatis ("Kalafatis"). The Judgment was entered against K&K Construction of Queens County, Inc. ("K&K") on September 15, 2010 (*Commissioners of the State Insurance Fund v. K&K Construction of Queens Country, Inc.*, New York County Index No. 401613/10) ("prior action").

SIF has filed proof of service on Kalafatis. Diligent attempts were made to personally serve Kalafatis on two separate occasions at his residence. The first attempt was on November 22, 2010 at 7:43 am. The second attempt was on November 25, 2010 at 6:28 pm. CPLR § 308(1). A copy of the Summons and Complaint was affixed to the door of

* 3]

Kalafatis' last known residence on December 1, 2010, after a third attempt of personal service was made that day. CPLR § 308(4). Service on Kalafatis was completed on December 10, 2010, when a copy of the Summons and Complaint was mailed to his last known address. CPLR § 308(4). SIF has submitted an affidavit that additional notice was sent to Kalafatis on March 4, 2011. CPLR § 3215(g)(3)(l). Kalafatis has not opposed the instant motion, thus it is considered on default. A default in answering the complaint is deemed to be an admission of all factual allegations contained in the complaint and all reasonable inferences that flow from them (Woodson v. Mendon Leasing Corp., 100 N.Y.2d 62 [2003]).

Facts and Arguments Considered

Plaintiff seeks to enforce this judgment against defendant Kalafatis, the sole shareholder and director of K&K at the time the company defaulted in paying its insurance policy premiums. Plaintiff alleges that K&K made payments to Kalafatis without consideration, while K&K was insolvent, and in excess of the Judgment, with the express purpose of avoiding payment of the insurance premiums. SIF claims to be entitled to have the distributions to Kalafatis set aside, declared null and void, and to enter a judgment in favor of SIF against Kalafatis for the Judgment.

Plaintiff issued a workers' compensation insurance policy to K&K, which was later cancelled for non-payment of premiums. SIF commenced the prior action against K&K to recover the unpaid premiums. In the prior action, SIF was awarded a judgment in the amount of \$112,836.36 ("Judgment") which remains unpaid.

At the time K&K defaulted on insurance payments, Kalafatis was the 100% sole shareholder, director and person in control of K&K. Kalafatis made loans to K&K in the

* 4]

amount of \$155,168.00 in 2008. As of December 31, 2008, K&K had repaid Kalafatis \$138,874.00 of the amount owed, leaving only a balance of \$16,295.00 unpaid.

Plaintiff contends that distributions were made by K&K to Kalafatis in excess of the Judgment, and while K&K was insolvent (1st cause of action). As a result of these distributions, K&K was left with an unreasonably small amount of capital and unable pay the Judgment against it (2nd cause of action). Plaintiff also claims that distributions were made to Kalafatis following June 21, 2010, during the pendency of this action, and thus should be null and void (3rd cause of action). To the extent that the loan repayments were made during the underlying action, SIF claims it is entitled to judgment against Kalafatis for those loan repayments (5th cause of action).

Plaintiff's principal claim is that the repayment of loans to Kalafatis was not for fair consideration and not in good faith, and thus, SIF is entitled to judgment against Kalafatis for the Judgment, plus accumulated interest (4th cause of action). Plaintiff asserts that if it is awarded judgment on the Fourth Cause of Action, SIF will discontinue the First, Second, Third and Fifth Causes of Action.

In support of this action, Plaintiff submits a record of the deposition transcript of Bob Orphanides ("Orphanides"), who states he is defendant's certified public accountant (CPA). Orphanides produced certain records, including K&K's 2008 form 1120S Federal Tax Return (marked as exhibit 1 at his deposition), and balance sheets listing K&K's assets and liabilities from January 1, 2008 to December 31, 2008. These documents prove plaintiff's claim that, as of January 1, 2008, Kalafatis had loaned K&K \$155,169.00, but that by December 31, 2008, only \$16,295.00 remained unpaid on the loan. Plaintiff contends that the transfer of funds from K&K to Kalafatis should be set aside or annulled in order to enforce the Judgment.

Applicable Law

The Debtor and Creditor Law applies to both individual and corporate debtors. In general terms, a conveyance is fraudulent if it is made without consideration by a debtor who is thus rendered insolvent (Debtor and Creditor Law, § 273). Similarly, a conveyance is also fraudulent if it is made without fair consideration when the transferor is engaged, or about to engage, in a business or transaction for which the remaining property in his hands is an unreasonably small capital thereby defeating the rights of creditors. Debtor and Creditor Law § 274. In each instance, "the conveyance is vulnerable to attack by a creditor without regard to the actual intent of the transferor" (Julien J. Studley, Inc. v. Lefrak, 66 A.D.2d 208, 213 (2nd Dept., 1979)). That is, the transfer itself is considered to be constructive fraud of the creditor (cf. Berlenbach v. Bischoff, 137 Misc 719 [Sup. Ct., Kings Co 1930]).

It has been held consistently that the provisions of section 278(a) authorize the rendition of a money judgment against the transferee of funds. See Julien J. Studley, Inc. v. Lefrak, 412 NYS2d 901 (2nd Dep't. 1979); Crete Concrete Corp. v. Joseph, 322 NYS2d 935 (1971). Though direct evidence of fraudulent intent is proof to invalidate a transfer under Section 278, such evidence is not necessary. See Dempster v. Overview Equities, Inc. 4 AD3d 495, 498 (2nd Dep't., 2004). Courts will often consider 'badges of fraud', which give rise to an inference of intent; they include: (1) the close relationship among the parties to the transaction; (2) the inadequacy of the consideration; (3) the transferor's knowledge of the creditor's claims, or claims so likely to arise as to be certain, and the transferor's inability to pay them; and (4) the retention of control of property by the transferor after the conveyance. Dempster v Overview Equities, Inc., *Supra*.

* 6]

Under Debtor Creditor law, fraud by an individual is justification to pierce the corporate veil and hold the individual liable for the debts of a corporation. See In re Rave Communications, Inc., 128 B.R. 390 (1992). Courts have allowed piercing of the corporate veil when an individual exercised complete domination of the corporation, which was used to commit a fraud or wrong against the plaintiff, and abused the privilege of doing business in the corporate form. See NPR, LLC v. Met Fin Management, Inc. 882 N.Y.S.2d 253 (2nd Dept., 2009), *cf.* Matter of Morris v. New York State Dept. of Taxation & Fin., 603 N.Y.S.2d 807; Millennium Constr., LLC v. Loupolover, 845 N.Y.S.2d 110; *see* Ventresca Realty Corp. v. Houlihan, 838 N.Y.S.2d 609). Knowledge of a debtor's insolvency at the time of a transfer of assets has been held to be one such abuse of doing business in the corporate form. In re Rave Communications, Inc., 1992, 128 B.R. 390.

Apart from the Debtor and Creditor Law, "the fiduciary nature of the relation between a corporation and its stockholders, directors and officers imposes a duty toward creditors of the corporation." Julien J. Studley, Inc. v. Lefrak, 66 A.D.2d 208, 213 (2nd Dept., 1979) *affirmed* 48 NY2d 954 (1979). This is because the assets of a corporation constitute a trust fund for the benefit of corporate creditors, requiring close scrutiny of a dominant stockholder's dealings with the corporation. Pepper v Litton, 308 U.S. 295; *cf.* Cross v Beguelin, 252 NY 262; Darcy v Brooklyn & N.Y. Ferry Co., 196 NY 99. A transfer of all the assets of a corporation to a sole stockholder or to a corporation controlled by the stockholder may be set aside when made in derogation of creditor's rights. Grad v Roberts, 14 NY2d 70, 76; Cole v Millerton Iron Co., 133 NY 164, 168.

Discussion

Plaintiff has established a "badge of fraud" for the reasons that follow. Kalafatis knew that the creditor's claims were likely to arise once K&K became insolvent. Kalafatis rendered the debtor corporation K&K insolvent by repaying loans to himself at a time when the plaintiff was a creditor. In doing so, he violated both section 273 and section 274 of the Debtor and Creditor Law. This action was also a violation of defendant's fiduciary duty to his corporate creditor SIF. As a result, his transfer of the assets of the debtor corporation was fraudulent as to the plaintiff, as a matter of law.

In addition, the plaintiff has alleged sufficient facts to pierce the corporate veil of K&K construction and to hold the individual defendant liable to the plaintiff. Kalafatis exercised complete domination of the corporation, which was used to commit a fraud or wrong against the plaintiff, and abused the privilege of doing business in the corporate form. See NPR, LLC v. Met Fin Management, Inc. 882 N.Y.S.2d 253 (2nd Dept., 2009).

Although it is unclear from the complaint whether K&K's debt to plaintiff existed at the time of all money transfers to defendant, under the statute, a creditor has standing to maintain an action to set aside a fraudulent transfer though his debt may not have been in existence at the time of the transfer. See, e.g., Young v Heermans, 66 NY 374 (1876); Williams & Co. v Euhler, 222 App Div 561 (1928).

K&K's loan repayments to Kalafatis lacked good faith and occurred when K&K was insolvent. Since \$138,874.00 in loan repayments to defendant were made in 2008 while K&K was insolvent, SIF is entitled to judgment against defendant for its damages equal to the Judgment, \$112,836.46, with interest from September 15, 2010, SIF is thus awarded judgment on its Fourth Cause of Action. It's First, Second, Third and Fifth Causes of action are accordingly discontinued.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiff, COMMISSIONERS OF THE STATE INSURANCE FUND's motion for entry of a default judgment against defendant KOSTAS KALAFATIS is **GRANTED** on default as to its fourth cause of action; and it is further

ORDERED that the clerk shall enter a money judgment against KOSTAS KALAFATIS in favor of COMMISSIONERS OF THE STATE INSURANCE FUND in the principal amount of one hundred and twelve thousand, eight hundred and thirty six dollars and forty six cents [\$112,836.46], with interest from September 15, 2010, together with the costs and disbursements of this action as taxed by the clerk and plaintiff shall have execution thereof;

ORDERED that plaintiff's 1st, 2nd, 3rd, and 5th causes of action are hereby severed as they were discontinued by the plaintiff; and it is further

ORDERED that any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated; New York, New York
 July 12, 2011

FILED

JUL 13 2011

**NEW YORK
COUNTY CLERK'S OFFICE**

So Ordered:



Hon. Judith J. Gische, JSC